RECORD AND BRIEFS

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No. 16-309

In the Supreme Court of the United States

DIVNA MASLENJAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Section 1425(a) of Title 18 of the United States Code provides that a person who "knowingly procures or attempts to procure, contrary to law, the naturalization of any person" commits a criminal offense. Upon conviction, Section 1451(e) of Title 8 of the United States Code requires revocation of that person's certificate of naturalization.

The question presented is whether a conviction under Section 1425(a) for knowingly procuring naturalization contrary to law, based on false statements made under oath in the defendant's application for naturalization and in sworn testimony during her naturalization proceedings, requires proof that the false statements were material.

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OPINION BELOW

The decision of the court of appeals (Pet. App. 1a-39a) is reported at 821 F.3d 675.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2016. A petition for rehearing was denied on May 27, 2016 (Pet. App. 40a). On August 3, 2016, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including September 26, 2016. The petition for a writ of certiorari was filed on September 8, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-8a.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of knowingly procuring naturalization contrary to law, in violation of 18 U.S.C. 1425(a); and knowingly using an unlawfully issued certificate of naturalization, in violation of 18 U.S.C. 1423. Pet. App. 2a. The district court sentenced petitioner to two years of probation and revoked her naturalization pursuant to 8 U.S.C. 1451(e). Pet. App. 6a. The court of appeals affirmed. *Id.* at 1a-39a.

1. a. Petitioner is an ethnic Serb and a native of what is today the nation of Bosnia and Herzegovina (Bosnia), formerly part of Yugoslavia. Pet. App. 3a. In the 1990s, as Yugoslavia disintegrated, Bosnia descended into a civil war between rival ethnic groups, including Bosnian Serbs and Bosnian Muslims. *Ibid.*; see, *e.g.*, 4/15/14 Tr. (Tr.) 70-77. With the exception of a brief sojourn to the Serbian city of Belgrade in 1992, petitioner remained in Bosnia throughout the war. Pet. App. 3a.

In April 1998, petitioner and her family met with an American immigration official in Belgrade to seek refugee status based on their supposed fear of persecution in Bosnia. Pet. App. 3a. Petitioner was the primary applicant on her family's application. *Id.* at 3a-4a. She stated under oath that her family feared persecution based on their Serbian ethnicity and because her husband, Ratko Maslenjak, refused to serve in the Bosnian Serb military during the civil war. *Id.* at 4a,

56a-60a. Petitioner swore that when she returned to Bosnia in 1992, her husband had remained in Serbia to avoid conscription. *Id.* at 4a, 58a-60a. Petitioner claimed that, as a result, she and her husband had lived apart from 1992 to 1997. *Id.* at 57a.

Based on those representations, petitioner and her family, including her husband, were granted refugee status and immigrated to the United States in 2000. Pet. App. 4a. In 2004, petitioner and her husband became lawful permanent residents of the United States. *Ibid.*; see, *e.g.*, J.A. 66, 70; Tr. 259.

b. Petitioner's story was false. In 2006, immigration officials confronted Ratko Maslenjak with military records establishing that he had been an officer in the Bratunac Brigade of the Army of the Republic Srpska, also known as the Bosnian Serb Army or VRS. Pet. App. 4a. Ratko's service coincided with the Bratunac Brigade's participation in the July 1995 genocide of 8000 Bosnian Muslim civilians in and around the town of Srebrenica. *Ibid.*; see Tr. 79-81, 83-87, 128-132.[1] Although the records did not directly implicate Ratko in war crimes, see Pet. App. 4a-5a, they contained significant evidence of his involvement, including that he was serving as a company commander in the Bratunac Brigade on the days of the massacre and that he was promoted to a higher rank two months later, see Tr. 124-125, 128, 131. The documents also indicated that Ratko was on active duty with the Bosnian Serb Army during the period when

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[1] The Srebrenica genocide is widely considered to be "Europe's worst massacre of civilians since World War II." Message on the Observance of the 10th Anniversary of the Massacre in Srebrenica, 2 Pub. Papers 1207 (July 11, 2005).

petitioner claimed that Ratko was hiding in Serbia to avoid conscription. Tr. 132.

Petitioner was present in 2006 when immigration officers interviewed Ratko about his prior military service. Pet. App. 4a. Soon after, Ratko was arrested and was charged with two counts of making a false statement on a government document. *Id.* at 4a-5a.

c. One week after Ratko's arrest for lying about his service in the Bratunac Brigade, petitioner filed an N-400 Application for Naturalization. Pet. App. 4a-5a, 65a-74a. One of the questions on the application asked whether petitioner had ever "given false or misleading information to any U.S. government official while applying for any immigration benefit or to prevent deportation, exclusion or removal." *Id.* at 72a (question 23). Another question asked whether petitioner had ever "lied to any U.S. government official to gain entry or admission into the United States." *Ibid.* (question 24). Petitioner falsely answered "no" to both questions but swore under oath that her answers were true. *Id.* at 72a, 74a. Petitioner was also interviewed under oath about her eligibility for naturalization and affirmed that her written answers were true and correct. *Id.* at 5a; see J.A. 94, 98-99. In August 2007, petitioner was naturalized as a United States citizen. Pet. App. 5a.

d. In October 2007, Ratko was convicted of making false statements on a government document, rendering him subject to removal from the United States. Pet. App. 5a. Petitioner then filed a Form I-130 Petition for Alien Relative seeking to classify Ratko as the spouse of a U.S. citizen, which would allow Ratko to seek lawful permanent resident status as relief from his removal proceedings. J.A. 104-105.

Ratko also filed an application for asylum. Pet. App. 5a. During petitioner's testimony at Ratko's asylum hearing, she admitted that she and Ratko had in fact lived together in Bosnia after 1992 and that she lied during her 1998 refugee application interview in Belgrade. *Id.* at 5a-6a; see J.A. 87-89.

2. A federal grand jury charged petitioner with one count of "knowingly procur[ing], contrary to law, her naturalization," in violation of 18 U.S.C. 1425(a). Indictment 1-2. The indictment alleged that petitioner "made material false statements" by answering "no" to questions 23 and 24 on her Application for Naturalization and by "answering the same" during her naturalization interview, even though she "then well knew that she had lied to government officials when applying for her refugee status and her lawful permanent resident status and thereby gained admission into the United States." *Ibid.* The grand jury also charged petitioner with knowingly misusing evidence of naturalization, in violation of 18 U.S.C. 1423, in connection with her attempt to avoid Ratko's removal by filing a Petition for Alien Relative on his behalf. Indictment 2.

3. The government contended at trial that petitioner committed an offense under Section 1425(a) by violating two federal laws in the course of procuring her naturalization: (1) 18 U.S.C. 1015(a), which prohibits knowingly making a false statement under oath in a naturalization proceeding; and (2) 8 U.S.C. 1427(a)(3), which prohibits the naturalization of a candidate who lacks "good moral character," *ibid.*, including a person "who has given false testimony for the purpose of obtaining" an immigration benefit, 8 U.S.C. 1101(f)(6). See Pet. App. 9a.

The district court instructed the jury that, "[i]n order to prove that [petitioner] acted 'contrary to law'" for purposes of Section 1425(a), "the government must prove that [petitioner] acted in violation of at least one law governing naturalization." Pet. App. 85a. The court explained that two such laws were at issue in this case—18 U.S.C. 1015(a) and 8 U.S.C. 1427(a)(3)—and that the jury could convict petitioner of a Section 1425(a) offense if it found that she acted contrary to either of those statutes. See Pet. App. 85a-86a. The court instructed the jury that a naturalization applicant violates Section 1015(a) if she "knowingly mak[es] any false statement under oath, relating to naturalization." *Id.* at 85a. Alternatively, the court stated that Section 1427(a)(3) "requires an applicant to demonstrate that 'she has been and still is a person of good moral character,'" and that "[g]iving false testimony for the purpose of obtaining any immigration benefit precludes someone from being regarded as having good moral character." *Id.* at 86a; see *ibid.* (explaining that "[i]f an applicant does not possess good moral character, the applicant is not entitled to naturalization"). The court further instructed the jury, over petitioner's objection, that a "false statement contained in an immigration or naturalization document does not have to be material in order for [petitioner] to have violated the law in this case." *Ibid.*; see *id.* at 82a (overruling petitioner's objection).

The jury convicted petitioner on both counts. Pet. App. 91a-94a. Under 8 U.S.C. 1451(e), petitioner's conviction for violating 18 U.S.C. 1425(a) resulted in mandatory revocation of her citizenship. Pet. App. 6a, 95a-96a.

4. The court of appeals affirmed. Pet. App. 1a-38a. Petitioner argued that materiality is an element of Section 1425(a) and that the district court erred in instructing the jury otherwise. Pet. C.A. Br. 15-19. The court rejected that argument.

First, the court of appeals observed that "the term 'material' is found nowhere in [Section] 1425(a)," and thus "[a] plain reading of the statute" indicates that materiality is not an element of the offense. Pet. App. 8a. The court explained that "[r]eading an implied element of materiality into" Section 1425(a) would be "inconsistent with other laws criminalizing false statements in immigration proceedings and regulating the naturalization process." *Id.* at 9a. The court observed that neither of the predicate violations of law supporting petitioner's Section 1425(a) conviction requires proof of materiality, and thus it would be "incongruous" to require such proof to establish that petitioner acted "contrary to" those laws in procuring her naturalization. *Id.* at 19a.

Second, the court of appeals explained that the lack of a materiality requirement under Section 1425(a) is consistent with Congress's provision for "a two-track system for denaturalization," one civil and the other criminal. Pet. App. 10a. The court noted that Congress has authorized denaturalization in a civil proceeding if (*inter alia*) the government establishes by clear, unequivocal, and convincing evidence that an alien procured naturalization by concealing or willfully misrepresenting a "material fact." *Ibid.* (quoting 8 U.S.C. 1451(a)). Congress imposed no similar materiality requirement for a criminal conviction pursuant to Section 1425(a), which results in mandatory denaturalization under 8 U.S.C. 1451(e). See Pet.

App. 10a. Instead, the court explained, the government must meet the exacting procedural and constitutional requirements of a criminal prosecution to proceed under that "track," including proving a predicate violation of law and other elements of the offense beyond a reasonable doubt. *Id.* at 10a, 12a-13a.

The court of appeals recognized that other courts of appeals had interpreted Section 1425(a) to contain an implied element of materiality, but it found those decisions "unpersuasive." Pet. App. 22a. The court explained that the leading case, *United States* v. *Puerta*, 982 F.2d 1297 (9th Cir. 1992), interpreted the phrase "contrary to law" in Section 1425(a) in a manner that "ignores the fact that other violations of federal law pertaining to false statements in immigration proceedings do not require proof of materiality." Pet. App. 24a. The court noted that other courts of appeals had followed *Puerta* "without engaging in their own analysis of the statutory language," *id.* at 23a, or had merely assumed that materiality was required based on the parties' agreement, *id.* at 22a.

Judge Gibbons filed a concurring opinion expressing her "uncertain[ty]" as to "what goal Congress intended to further by omitting materiality from the elements of [Section] 1425(a)." Pet. App. 39a. Nonetheless, she joined the court's opinion because "the view most faithful to the statute is that materiality is not an element of the [Section] 1425(a) offense." *Ibid.*

SUMMARY OF ARGUMENT

The government was not required to prove that petitioner's false statements were material in order to obtain a conviction under Section 1425(a).

I. A. Section 1425(a) of Title 18 of the United States Code is an umbrella statute that imposes crim-

inal penalties on individuals who procure naturalization in a manner "contrary to" other laws. Some of those laws require proof that the defendant made a material false statement. When a defendant is alleged to have acted "contrary to" such a law for purposes of Section 1425(a), the government must prove materiality to establish the predicate violation. But other predicate violations—including the ones in this case—do not require a material false statement. And still others (like bribery, identity theft, or committing other disqualifying crimes) involve conduct that cannot reasonably be analyzed for "materiality" at all.

No justification exists for inserting an element of materiality in Section 1425(a). That term does not appear in the statute, nor does it appear in 8 U.S.C. 1451(e), which mandates denaturalization upon a conviction under Section 1425(a). Implying such an element would effectively preclude the consistent application of Section 1425(a) to all potential predicate violations of law. The better interpretation, and the one most faithful to the text, is that a person violates Section 1425(a) if she procures naturalization in a manner that violates another provision of law that governs the naturalization process, defined according to the elements of the precise violation at issue.

B. The statutory phrase "procures * * * contrary to law" does not imply a materiality requirement. 18 U.S.C. 1425(a). An individual need only procure her naturalization in a manner that violates the law; the statute does not say (as petitioner does, Br. 3) that the violation of law must itself "procure[]" or "caus[e]" the naturalization. That interpretation is inconsistent with numerous decisions of this Court interpreting the term "procured" in the naturalization context, which

make clear that an individual "procures" her naturalization unlawfully if she violates the rules Congress has set forth for obtaining naturalization—even if she would have obtained naturalization without violating the law.

C. The history and evolution of Section 1425(a) and related statutes confirms that materiality is not an element of the statute. Congress has long prohibited false statements made under oath in the naturalization process, some material and some immaterial, and it has consistently required aliens to demonstrate good moral character in order to be naturalized, a requirement that is not satisfied if the alien gives false but immaterial testimony. Congress deliberately eliminated the materiality requirements in those statutes over the years, including two material false statement offenses that appeared in the same section of a 1906 statute from which Section 1425(a) descends. At the same time, Congress has expanded the scope of the criminal unlawful procurement provision and has specified that it applies to violations of *any* law, not just those that prohibit material falsehoods.

D. The lack of a materiality requirement in Section 1425(a) is not inconsistent with the presence of such a requirement in one provision of the civil denaturalization statute, 8 U.S.C. 1451(a). A number of procedural and substantive differences between Section 1425(a) and Section 1451(a) help explain why Congress thought it useful to permit denaturalization in either civil or criminal proceedings. No reason exists to presume that Congress intended that the presence of an alternative materiality requirement in the former would require courts to imply an element of materiality in the latter.

E. The constitutional avoidance doctrine does not support petitioner's interpretation because no constitutional principle prohibits Congress from requiring that aliens not make false statements under oath, even immaterial ones, in procuring their naturalization. Nor does the rule of lenity apply. Section 1425(a) contains no grievous ambiguity that would require the Court to guess at the statute's meaning. Petitioner's interpretation is inconsistent with the text, structure, and history of the statute and should be rejected.

II. A. This Court should decline to address petitioner's alternative argument that 18 U.S.C. 1015(a) requires proof of materiality even if Section 1425(a) does not. Petitioner's question presented identifies a specific circuit conflict over whether materiality is an element of Section 1425(a). No similar conflict exists concerning whether Section 1015(a) requires proof of materiality: all of the courts of appeals to have considered the question, including two of the circuits identified in petitioner's question presented, have held that it does not. Petitioner also waived any argument that Section 1015(a) requires proof of materiality in the court of appeals. Moreover, although construing Section 1015(a) to require materiality may be an alternative ground for reversing petitioner's conviction on the facts of this case, it would not resolve the question presented, which concerns whether, as a general matter, an alien may be denaturalized following a criminal conviction under Section 1425(a) based on immaterial false statements.

B. Regardless, Section 1015(a) does not require proof of materiality. This Court has rejected any general presumption of materiality in false statement statutes. To the contrary, it has held that such stat-

utes do *not* generally require proof of materiality unless Congress incorporates an express materiality element or a common law term that is understood to require materiality. Congress has included a materiality element in some false statement statutes but not in Section 1015(a). The history of Section 1015(a) confirms that materiality is not required.

III. In any event, petitioner's lies were material and so any error in the jury instructions was harmless. Petitioner lied about her husband's activities and whereabouts during the Bosnian civil war in an effort to conceal the fact that he was a commanding officer in a military unit that committed acts of persecution culminating in genocide. She perpetuated those lies in her naturalization proceedings. The government presented extensive and unrebutted evidence at trial that, had officials known the truth, it would have affected their decision to grant petitioner and her family refugee status and their subsequent decision to grant petitioner citizenship.

ARGUMENT

PETITIONER'S CONVICTION UNDER 18 U.S.C. 1425(a), BASED ON HER FALSE STATEMENTS IN PROCURING NATURALIZATION, SHOULD BE AFFIRMED

I. MATERIALITY IS NOT AN ELEMENT OF 18 U.S.C. 1425(a)

This Court has long recognized that "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Dixon* v. *United States*, 548 U.S. 1, 7 (2006) (citation omitted; brackets in original). As a consequence, courts "ordinarily resist reading words or elements into a statute that do not appear on its face." *Dean* v. *United States*,

556 U.S. 568, 572 (2009) (citation omitted); see *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986) ("[A] legislature's definition of the elements of [an] offense is usually dispositive."). This Court has departed from that principle in limited circumstances, such as to supply a *mens rea* element where Congress did not specify one, *e.g.*, *Elonis* v. *United States*, 135 S. Ct. 2001, 2009 (2015), or to give meaning to a common law term incorporated in a criminal statute, *e.g.*, *Neder* v. *United States*, 527 U.S. 1, 23 (1999). Otherwise, the Court enforces the "cardinal" presumption that Congress "says in a statute what it means and means in a statute what it says." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253, 254 (1992). Petitioner's effort to insert the word "material" in Section 1425(a) does not overcome that presumption.

A. The Text Of Section 1425(a) Contains No Independent Materiality Requirement

1. Section 1425(a) makes it a crime to "knowingly procure[] or attempt[] to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or of citizenship." 18 U.S.C. 1425(a). As the court of appeals noted, "the term 'material' is found nowhere in [Section] 1425(a)." Pet. App. 8a. Nor does the statute define a common law offense that has historically required materiality. See *Neder*, 527 U.S. at 22 (inferring that Congress intended to require proof of materiality in the mail, wire, and bank fraud statutes because "the common law could not have conceived of 'fraud' without proof of materiality"). Congress's failure to "so much as mention materiality" in Section 1425(a) provides compelling evidence that the statute does not require such proof. *United States* v. *Wells*, 519 U.S. 482, 490 (1997)

(holding that 18 U.S.C. 1014, which makes it a crime to "knowingly make[] any false statement or report * * * for the purpose of influencing" a bank, does not require proof of a material false statement).

2. Implying an element of materiality in Section 1425(a) would effectively preclude consistent application of the statute. Section 1425(a) is an umbrella provision that punishes the commission of other violations of law in the course of procuring naturalization. By requiring proof that the defendant acted "contrary to law," the statute requires the government to prove the elements of the underlying offense or violation. See *Bridge* v. *Phoenix Bond & Indem. Co.*, 553 U.S. 639, 647-653 (2008).

Some of those predicate offenses already require proof of materiality. A defendant could, for example, violate Section 1425(a) by willfully making a "materially false * * * statement" in a naturalization application, in violation of 18 U.S.C. 1001(a)(2). See, *e.g.*, *United States* v. *Munyenyezi*, 781 F.3d 532, 536 (1st Cir.), cert. denied, 136 S. Ct. 214 (2015); *United States* v. *Latchin*, 554 F.3d 709, 712 (7th Cir. 2009), cert. denied, 558 U.S. 1116 (2010). Or she could make a false statement under oath "with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations," in violation of 18 U.S.C. 1546(a). See *e.g.*, *United States* v. *Alameh*, 341 F.3d 167, 171-172 (2d Cir. 2003). In such cases, the jury would be required to find that the false statement was material in order to establish that the defendant acted "contrary to law."

As petitioner acknowledges (Br. 25), however, other predicate violations do not require proof of a material false statement. The violations at issue in this case

are good examples. Under 8 U.S.C. 1427(a)(3), a defendant is ineligible for naturalization if she lacks "good moral character," which is defined to exclude anyone "who has given false testimony for the purpose of obtaining any benefits" under the immigration laws, 8 U.S.C. 1101(f)(6).[2] In *Kungys* v. *United States*, 485 U.S. 759 (1988), this Court held that those provisions do not require proof that the false testimony concerned a material matter. See *id.* at 779-780 ("Literally read, [Section 1101(f)(6)] denominates a person to be of bad moral character on account of having given false testimony if he has told even the most immaterial of lies with the subjective intent of obtaining immigration or naturalization benefits. We think it means precisely what it says."). Congress has also made it a crime to "knowingly make[] any false statement under oath, in any case, proceeding, or matter relating to * * * naturalization." 18 U.S.C. 1015(a). The courts of appeals that have construed that provision uniformly agree that it does not require proof that the false statement concerned a matter material to the naturalization decision. See *United States* v. *Youssef*, 547 F.3d 1090, 1095 (9th Cir. 2008) (per curiam); *United States* v. *Abuagla*, 336 F.3d 277, 279 (4th Cir. 2003); see also pp. 42-47, *infra*.

Section 1425(a) also encompasses a number of predicate violations to which a materiality requirement could not sensibly be applied. For example, in

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[2] An alien must demonstrate good moral character for at least five years before filing her naturalization application. See 8 U.S.C. 1427(a)(1) and (3). In determining whether the alien has made that showing, however, the government "may take into consideration * * * the applicant's conduct and acts at any time prior to that period." 8 U.S.C. 1427(e).

addition to giving false testimony, an alien is considered to lack "good moral character" (making her ineligible for naturalization) if she has committed certain drug offenses or crimes involving moral turpitude, 8 U.S.C. 1101(f)(3); has been convicted of an aggravated felony, 8 U.S.C. 1101(f)(8); or has engaged in conduct relating to acts of genocide, torture, or extrajudicial killings, 8 U.S.C. 1101(f)(9). An alien could also violate Section 1425(a) by bribing an immigration official, 18 U.S.C. 201(b)(1), or by stealing another person's identity, 18 U.S.C. 1028A(a)(1) and 1424. None of those provisions requires proof of a "material" act. And petitioner offers no explanation for how a jury could rationally determine whether such offenses involved "material" matters if that were an element of Section 1425(a).

In an effort to escape that conundrum, petitioner proposes (Br. 25) a materiality requirement for Section 1425(a) that "would apply only in the subset of cases involving statements and not in cases involving a non-statement predicate offense." Petitioner would thus interpret Section 1425(a) to superimpose a materiality requirement on "statement[]" offenses that do not themselves require proof of materiality but not on "non-statement" offenses that also do not require such proof. *Ibid.* Yet petitioner cites nothing in the text of the statute, or in logic, to suggest that Congress intended such a result. Section 1425(a) does not distinguish between "statement[]" and "non-statement" offenses, nor does it contain any indication that Congress intended to require an element that would supplement some predicate offenses, be redundant of others, and be irrelevant to the remainder. A single statutory provision should be interpreted to have the

same meaning in all of its applications. See *Clark* v. *Martinez*, 543 U.S. 371, 378 (2005). No reason exists to apply a different rule to Section 1425(a).

3. The more natural (and correct) reading of Section 1425(a) is that the defendant must knowingly procure naturalization in a manner that violates the laws governing the naturalization process, including laws that specify who may obtain citizenship and how they must do so. If the underlying violation requires proof of materiality, the jury must find materiality in order to convict. But where Congress has not limited the underlying violation to a material matter—by, for example, providing that certain immaterial false statements are criminally prohibited in a naturalization proceeding or render an alien ineligible for citizenship—it makes little sense to impose a supplemental materiality requirement under Section 1425(a).

That is not to say that evidence of materiality is irrelevant to a conviction under Section 1425(a) whenever the predicate violation encompasses immaterial false statements. Materiality may, for example, be persuasive evidence of *mens rea*: a properly instructed jury, applying a reasonable doubt standard, is less likely to find that a defendant who made immaterial false statements—particularly "trivial" ones (Pet. Br. 36)—*knowingly* lied under oath and *knowingly* violated the law. See 18 U.S.C. 1425(a). The natural inference in such cases may be that the falsehood was a product of confusion, mistake, forgetfulness, or negligence, none of which supports criminal liability under Section

1425(a).[3] But materiality is not an independent element of the statute.

B. The Term "Procures * * * Contrary To Law" Does Not Imply That A False Statement Must Be Material

In an effort to anchor her proposed materiality requirement to the text of Section 1425(a), petitioner focuses on the language "procures * * * contrary to law," which she asserts (Br. 3) "require[s] a causal link—'procurement'—between the underlying violation of law and the naturalization decision." That argument is incorrect for several reasons.

First, petitioner's argument is inconsistent with the structure of Section 1425(a). The statute describes the actor ("Whoever"); her mental state ("knowingly"); the acts she must perform ("procures or attempts to procure"); how those acts are performed ("contrary to law"); and the object of those acts ("naturalization"). 18 U.S.C. 1425(a). That language and structure is most naturally read to mean precisely what it says: a person who knowingly procures naturalization in an unlawful manner (*e.g.*, by violating the laws Congress has enacted governing the eligibility and conduct of those seeking to become U.S. citizens) has violated the statute. In arguing to the contrary, petitioner restructures the statutory text to make "contrary to law" the actor that does the procuring. See Pet. Br. 3 (rewording statute to say "that the underlying violation of law *procured* the naturalization"); *id.* at 21 ("the violation of law must have been the means of procurement"); *id.* at 24 (the "false statement

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[3] Amici's suggestion to the contrary is mistaken. See Asian Am. Advancing Justice et al. Br. 5-9; Immigrant Def. Project et al. Br. 10-19.

[must] 'procure' naturalization"). That is not the statute Congress enacted.

Second, petitioner's interpretation conflicts with her own proposed construction of Section 1425(a). As explained, petitioner would have this Court interpret the statute to impose a materiality requirement for any predicate violation of law that involves a false statement (whether or not the predicate statute itself requires materiality) but not for so-called "non-statement" predicate offenses. See Pet. Br. 25. But petitioner fails to explain how that construction could be correct if the phrase "procures * * * contrary to law"—which applies to *all* violations of Section 1425(a)—itself requires proof of materiality. 18 U.S.C. 1425(a).

Third, petitioner's interpretation is inconsistent with comparable provisions in the civil denaturalization statute, 8 U.S.C. 1451. Section 1451(a) permits denaturalization following a civil proceeding if the government establishes that "naturalization w[as] illegally procured or w[as] procured by concealment of a material fact or by willful misrepresentation." 8 U.S.C. 1451(a). This Court has long interpreted the term "illegally procured" to incorporate the principle that the laws governing naturalization "must be complied with strictly, as in other instances of Government gifts," and has held that an alien's failure to comply with those laws in the course of obtaining citizenship renders his naturalization "illegally procured * * * in the sense that it is unauthorized by and contrary to the law." *Maney* v. *United States*, 278 U.S. 17, 22 (1928) (Holmes, J.); see, *e.g.*, *Fedorenko* v. *United States*, 449 U.S. 490, 506 (1981) (noting the need for "strict compliance" with conditions for naturalization and holding

that "[f]ailure to comply with any of th[o]se conditions renders the certificate of citizenship 'illegally procured'" and void) (citation omitted); *United States* v. *Ginsberg*, 243 U.S. 472, 475 (1917) ("If [naturalization is] procured when prescribed qualifications have no existence in fact it is illegally procured.").

As the court of appeals observed, the Court's illegal procurement cases have generally involved violations of the procedural and substantive prerequisites to naturalization. Pet. App. 15a-17a. The term "contrary to law" in Section 1425(a) is broader, including "not only violations of the * * * administrative requirements for naturalization but also any criminal offense against the United States pertaining to naturalization." *Id.* at 17a; see *id.* at 85a (district court instructs jury that it must find "that [petitioner] acted in violation of at least one law governing naturalization").[4] But in no case has this Court suggested that the underlying violation of law must "cause" the alien's naturalization to be granted—or, conversely,

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[4] Even if the term "contrary to law" in Section 1425(a) were construed to require a violation of the administrative prerequisites to naturalization, the predicate violations in this case would qualify. As explained, an alien must establish her "good moral character" to be eligible for naturalization. 8 U.S.C. 1427(a)(3). Giving false testimony for the purpose of obtaining an immigration benefit precludes a finding of good moral character. 8 U.S.C. 1101(f)(6). So, too, could a violation of 18 U.S.C. 1015(a). See 8 U.S.C. 1101(f) (noting that the statutory enumeration of acts that preclude a finding of good moral character "shall not preclude a finding that for other reasons such person is or was not of good moral character"); 8 C.F.R. 316.10(b)(3)(iii) (providing that a person lacks good moral character if he "[c]ommitted unlawful acts that adversely reflect upon [his] moral character" that "do not fall within the purview" of specific statutory exclusions).

that naturalization would have been denied absent the violation—for it to be unlawfully "procured."

In *Ginsberg*, *supra*, for example, this Court held that an alien had "illegally procured" his citizenship where his final naturalization hearing took place before a judge in chambers rather than in open court as required by law. 243 U.S. at 472-473 (citation omitted). The Court held that this "mistake by the judge" rendered the naturalization illegally procured notwithstanding the lack of any indication that the alien's eligibility for naturalization would have been analyzed differently in an open hearing. *Id.* at 475. Similarly, in *United States* v. *Ness*, 245 U.S. 319 (1917) (Brandeis, J.), the Court upheld the cancellation of an alien's naturalization based on the alien's failure to properly file a certificate "stating the date, place and manner" of his arrival in the United States. *Id.* at 320 (citation omitted). Although the Court expressed no doubt that the alien "possessed the personal qualifications which entitle aliens to admission and to citizenship," it noted that the alien's failure to obtain the certificate was a statutory violation and that "[n]aturalization granted without the certificate having been filed" was "illegally procured." *Id.* at 321, 324-325. And in *Maney*, *supra*, the Court upheld the cancellation of naturalization where the government furnished the alien with necessary documents 11 days too late. 278 U.S. at 21. The district court attached the documents to the alien's naturalization application *nunc pro tunc* and granted him citizenship; this Court held that the filing did not strictly comply with legal requirements and thus the alien's citizenship was illegally procured, even though the alien plainly would have been naturalized absent the violation. *Id.* at 23.

"In case after case," this Court has "rejected lower court efforts to moderate or otherwise avoid the statutory mandate of Congress in denaturalization proceedings" and has upheld denaturalization orders based on an alien's failure to act as "required by statute"—notwithstanding the fact that, had the alien complied with the statute, he would have been "entitle[d] * * * to citizenship." *Fedorenko*, 449 U.S. at 517 (quoting *Ness*, 245 U.S. at 321). An alien who makes false statements under oath or who gives false testimony during the naturalization process, in violation of federal laws that specifically prohibit such conduct, should be held to the same standard.

Petitioner's interpretation also finds no support in the second clause of 8 U.S.C. 1451(a), which authorizes the cancellation of citizenship "procured by concealment of a material fact or by willful misrepresentation." In *Kungys*, *supra*, a plurality of this Court concluded that the "procured by" language in that provision does *not* impose a "causation requirement" or otherwise require the government to "establish that naturalization would not have been granted if the misrepresentations or concealments had not occurred." 485 U.S. at 776, 777. Rather, the plurality determined that the word "procured" requires only "that citizenship be obtained as a result of the application process in which the misrepresentations or concealments were made," and that the further combination of "procured by" and "material" (which does not appear in Section 1425(a)) creates a "rebuttable presumption" that an alien "who obtained his citizenship" as the result of such a process "was *presumably* disqualified." *Ibid.*

Justice Brennan joined the plurality's rejection of a causation requirement, writing separately to express his view that the government must show only "a fair inference" that the alien was not qualified in order to shift the burden to the alien. *Kungys*, 485 U.S. at 783 (Brennan, J., concurring). And two Justices rejected outright the idea that the statute required proof of the concealment or misrepresentation of facts that would likely have affected the government's decision had the truth been known, arguing instead that the alien's "*failure to state the truth*" was itself "material" to the naturalization process. *Id.* at 810 (White and O'Connor, JJ., dissenting) (citation omitted). A causation requirement of the sort petitioner proposes garnered only three votes. See *id.* at 788-789 (Stevens, J., concurring in the judgment). Even less reason exists to infer such a requirement in Section 1425(a), which lacks the terms "procured by" or "material."

C. The Legislative History Of Section 1425(a) Confirms That Proof Of Materiality Is Not Required

Because "the statutory language provides a clear answer" to the question of whether proof of materiality is required to violate Section 1425(a), the construction of the statute "ends there." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999); see *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (statutory construction ceases "if the statutory language is unambiguous and the statutory scheme is coherent and consistent") (citation omitted). Even if the text were ambiguous, however, the legislative history of Section 1425(a) leaves no doubt that Congress did not intend to limit the scope of that provision to material false statements.

1. The Constitution entrusts Congress with "the power to give or withhold naturalization and to that end 'to establish a uniform Rule of Naturalization.'" *Baumgartner* v. *United States*, 322 U.S. 665, 672 (1944) (quoting U.S. Const. Art. I, § 8, Cl. 4). Since the Founding, Congress has implemented that authority through a series of enactments designed to ensure that only honest and law-abiding persons are naturalized as citizens. In the first naturalization act in 1790, Congress specified (as it has consistently since) that naturalization is a privilege extended only to "person[s] of good character." Act of Mar. 26, 1790, ch. III, § 1, 1 Stat. 103. That requirement reflected the view of several members of the House of Representatives, including James Madison, that Congress should take "the cautions necessary to guard against abuses" of the naturalization process and that individuals who by their character or conduct would not "add[] to the strength or wealth of the community are not the people we are in want of." 1 Annals of Cong. 1150 (1790) (Joseph Gales ed., 1834) (statement of Rep. Madison); see *id.* at 1152, 1153 (statement of Rep. Jackson) (arguing that candidates for naturalization must reflect "the respectability and character of the American name" and should "be able to bring testimonials of a proper and decent behaviour"); *id.* at 1156 (statement of Rep. Sedgwick) (arguing that naturalization should "admit none but reputable and worthy characters").

For nearly as long, Congress has made it a crime to "temporiz[e] with the truth" in naturalization proceedings. *Chaunt* v. *United States*, 364 U.S. 350, 352 (1960). See, *e.g.*, Act of Mar. 3, 1813, ch. XLIII, § 13, 2 Stat. 811 (making it a felony to "falsely make, forge, or counterfeit * * * any certificate or evidence of citizenship").

Some of those provisions have been limited to material false statements while others have not.

In 1870, for example, Congress responded to the proliferation of frauds and abuses in citizenship cases by enacting a comprehensive (and overlapping) set of false statement offenses to "purify the process of naturalization." Cong. Globe, 41st Cong., 2d Sess. 5121 (1870) (statement of Sen. Conkling); cf. *id.* at 4838 (statement of Sen. Vickers) (observing that criminal provisions were "as broad and comprehensive as [they] well can be" and "seem[] to provide for every imaginable case"). See Act of July 14, 1870 (1870 Act), ch. CCLIV, 16 Stat. 254. Some of those offenses required proof of materiality. See *id.* § 1, 16 Stat. 254 (defining "perjury" to include "knowingly swear[ing] or affirm[ing] falsely" in proceedings "relating to the naturalization of aliens").[5] Others did not require such proof. See *id.* § 2, 16 Stat. 254 (making it a crime to "falsely make * * * any oath" or written statement in a "proceeding * * * relating to or providing for the naturalization of aliens," or to "utter" or "use as true" such a statement).

In 1906, Congress further responded to "[g]rievous abuses" of the naturalization process, *Ginsberg*, 243 U.S. at 473, by consolidating the requirements for naturalization and enacting new criminal penalties for misuse of the naturalization process. See Act of June 29, 1906 (1906 Act), ch. 3592, 34 Stat. 596. One of those provisions—the progenitor of Section 1425(a)—made it a crime to "knowingly procure[] naturalization in violation of the provisions of this Act" and provided that, "upon conviction" for that offense, the court

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[5] Perjury required proof of materiality at common law. See *Wells*, 519 U.S. at 491.

"shall thereupon adjudge and declare the final order admitting such person to citizenship void." *Id.* § 23, 34 Stat. 603. In the same section, Congress also created two new false statement offenses that expressly required materiality. See *ibid.* (making it a felony to "knowingly procure[] or give[] false testimony as to any material fact" or to "knowingly make[] an affidavit false as to any material fact" in a naturalization proceeding).

In the years that followed, Congress repeatedly expanded the scope of those criminal provisions, including by eliminating materiality requirements. In 1909, Congress replaced Section 1 of the 1870 Act with a provision that omitted the earlier section's reference to perjury. See Act of Mar. 4, 1909 (1909 Act), ch. 321, § 80, 35 Stat. 1103 (making it a crime to "knowingly swear falsely in any case where an oath is made or [an] affidavit taken" "in any proceeding under or by virtue of any law relating to the naturalization of aliens"). In 1940, Congress eliminated the materiality offenses in Section 23 of the 1906 Act and broadened the scope of the unlawful procurement provision to make it a crime "[k]nowingly to procure or attempt to procure * * * [t]he naturalization of any * * * person, contrary to the provisions of any law." Nationality Act of 1940 (1940 Act), ch. 876, Tit. I, § 346(a)(2), 54 Stat. 1163. The statute further provided, as did the 1906 Act, that a conviction for that offense would result in denaturalization. *Id.* § 338(e), 54 Stat. 1159.[6]

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[6] In his report to Congress on the proposed bill, President Roosevelt noted that the criminal denaturalization provision in the 1906 Act had been "highly successful in its operation," including by averting the "great amount of extra labor which would otherwise have been required in instituting cancellation proceedings in

The language of the unlawful procurement provision was modified to its present form and moved to Section 1425(a) as part of the revision and recodification of the criminal code in 1948. See Act of June 25, 1948, ch. 69, § 1425(a), 62 Stat. 766. The 1948 revision "was not intended to create new crimes" and presumptively "worked [no] change in the underlying substantive law." *Scheidler* v. *National Org. for Women, Inc.*, 547 U.S. 9, 20 (2006) (citations omitted).

2. This history leaves little doubt that Congress did not intend to limit Section 1425(a) to "material" false statements. When Congress has intended to impose such a limitation in a criminal naturalization provision, it has done so clearly, either by using the word "material" (see 1906 Act § 23, 34 Stat. 603) or by using a common law term like "perjury" that is understood to include a materiality requirement (see 1870 Act § 1, 16 Stat. 254). Congress's enactment of other criminal provisions that are not so limited, often in the same statutes and sometimes in the same sections, "speaks volumes." *United States* v. *Shabani*, 513 U.S. 10, 14 (1994); see *Barnhart*, 534 U.S. at 452 ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress act[ed] intentionally and purposely.") (citations and internal quotation marks omitted).

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equity" to "revoke * * * naturalization fraudulently procured." *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearings Before the H. Comm. on Immigration and Naturalization on H.R. 6127 Superseded by H.R. 9980*, 76th Cong., 1st Sess. 471 (1940) (reprinting report).

Congress has also repeatedly broadened the scope of criminal naturalization provisions by eliminating language requiring proof of materiality—including, most notably, the material false statement offenses found in the same section of the 1906 Act as the precursor of Section 1425(a). That, too, gives rise to a strong inference "that Congress deliberately dropped the term 'materiality' without intending materiality to be an element" of Section 1425(a). *Wells*, 519 U.S. at 493 (same regarding elimination of materiality requirement in predecessors to 18 U.S.C. 1014).

Moreover, at the same time it eliminated those materiality offenses, Congress expanded the unlawful procurement provision to include the procurement of naturalization "contrary to the provisions of *any* law." 1940 Act § 346(a)(2), 54 Stat. 1163 (emphasis added). The language and structure of that provision is not susceptible to the interpretation petitioner advances: it clearly identified the evil Congress sought to address as the procurement of naturalization in a manner that violates some provision of law, not just the making of material false statements. Those predicate violations would have included the good moral character requirement and the false statement offense (then codified at 8 U.S.C. 746(a)(1) (1940) and later recodified as 18 U.S.C. 1015(a)) that Congress originally adopted in the 1870 Act and amended in 1909 to remove any requirement of materiality.

The meaning of Section 1425(a) is the same today as it was in 1940. Now, as then, materiality is not an element of the statute.

D. Congress's Decision To Include A Materiality Requirement In 8 U.S.C. 1451(a) Is Not Inconsistent With The Absence Of Such A Requirement In Section 1425(a)

As the court of appeals explained, federal law "creates what are essentially two alternative paths for denaturalization," one civil and one criminal. Pet. App. 10a. Under 8 U.S.C. 1451(a), a citizen's naturalization may be set aside in a civil proceeding if the "naturalization w[as] illegally procured or w[as] procured by concealment of a material fact or by willful misrepresentation." Under 8 U.S.C. 1451(e), denaturalization is a mandatory consequence of a criminal conviction under Section 1425(a).

Petitioner asserts (Br. 26) that the presence of a materiality requirement in Section 1451(a) implies that materiality is also an element of Section 1425(a) because "[t]here is no reason to suppose that Congress would have intended to authorize denaturalization in a criminal proceeding * * * based on a *less* demanding substantive standard." Pet. Br. 26. That argument is incorrect.

1. Section 1451(a) originated in the same 1906 enactment that created the precursor to Section 1425(a). See 1906 Act § 15, 34 Stat. 601 (authorizing the government to "institute proceedings * * * for the purpose of setting aside and canceling [a] certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured"). That provision was carried through in subsequent statutes, including the 1940 Act that eliminated the 1906 Act's material false statement offenses, broadened the criminal unlawful procurement provision to its present form, and reaffirmed that a convic-

tion under that provision would result in mandatory denaturalization. See 1940 Act § 338(a), 54 Stat. 1158-1159.

In 1952, Congress amended the civil denaturalization provision to replace the term "fraud" with "concealment of a material fact or willful misrepresentation" and to eliminate the separate ground of illegal procurement. Immigration and Nationality Act (INA), ch. 477, Tit. III, § 340(a), 66 Stat. 260. It did so to resolve judicial confusion over whether the term "fraud" covered both "intrinsic" and "extrinsic" frauds and whether fraud and illegality were distinct concepts. S. Rep. No. 1515, 81st Cong., 2d Sess. 754-769 (1950); see *Costello* v. *United States*, 365 U.S. 265, 271 n.3 (1961). It also reenacted the provision requiring denaturalization following a conviction under Section 1425(a), with no reference to materiality. See INA § 349(g), 66 Stat. 262 (8 U.S.C. 1451(e)).

Congress later thought better of its decision to eliminate the illegal procurement ground, however, and restored it in 1961. See Act of Sept. 26, 1961, Pub. L. No. 87-301, § 18(a), 75 Stat. 656. The House Report explains that Congress did so because the 1952 provision, which prevented civil denaturalization "unless it is proved that the naturalized person has been guilty of wrongdoing amounting to concealment of a material fact or willful misrepresentation," was underinclusive. H.R. Rep. No. 1086, 87th Cong., 1st Sess. 38 (1961) (1961 House Report); see *id.* at 39 ("The congressional mandate that no person shall be naturalized unless possessed of certain qualifications is ineffectual unless there is also statutory provision for revoking citizenship where the prerequisites did not in fact exist. In the majority of such cases it is difficult if

not impossible to prove that there was concealment of material facts or willful misrepresentation."). The House Report noted, for example, that limiting civil denaturalization to the concealment or misrepresentation of material facts would be inconsistent with the "clear and unmistakable purpose and intent" of the good moral character requirement in 8 U.S.C. 1427(a)(3) and 1101(f), which "bar[s] [an alien] from eligibility for naturalization" if, *inter alia*, he, gives false testimony on an immaterial matter. 1961 House Report 39.

The most appropriate inference from this history is the opposite of the one petitioner would draw. Congress specifically limited denaturalization under the second clause of Section 1451(a) to "fraud" or, later, willful "concealment" or "misrepresentation" of a "material fact" (the definition of fraud).[7] Indeed, from 1952 to 1961, that was the *only* ground on which civil denaturalization was available. Congress did not, however, include that requirement in the contemporaneous criminal provision governing the procurement of naturalization contrary to law or in the civil provision mandating denaturalization following a conviction for that offense. This Court's general reluctance to "assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply" is "even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005). As

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[7] This Court has construed the willfulness and materiality requirements in Section 1451(a) to apply equally to "concealment" and "misrepresentation." *Kungys*, 485 U.S. at 767 (citing *Fedorenko*, 449 U.S. at 507-508 n.28).

with the prior criminal provisions governing naturalization proceedings, the presence of materiality language in 8 U.S.C. 1451(a) indicates that Congress did not intend to impose a similar requirement in Section 1425(a) or the corresponding denaturalization provision in 8 U.S.C. 1451(e). See, *e.g.*, *Barnhart*, 534 U.S. at 452; *Shabani*, 513 U.S. at 14.

2. Petitioner's real complaint relates to the supposed lack of a reason *why* Congress imposed different requirements for denaturalization in civil and criminal cases. Of course, "mere silence in the legislative history cannot justify reading * * * a materiality element into the statute." *Whitfield* v. *United States*, 543 U.S. 209, 216 (2005) (citing *Wells*, 519 U.S. at 496-497). Regardless, petitioner is incorrect.

First, petitioner focuses heavily on the clause of Section 1451(a) permitting denaturalization based on concealment or misrepresentation of a material fact but largely ignores the other clause of the statute, which permits the cancellation of citizenship that was "illegally procured." 8 U.S.C. 1451(a). As explained (see pp. 20-21, *supra*), that ground overlaps substantially with the requirement in Section 1425(a) that naturalization be "procure[d] * * * contrary to law" and does not require proof of materiality. Indeed, Congress restored the illegal procurement ground to 8 U.S.C. 1451(a) in 1961 precisely because the statute's reference to concealment and misrepresentation of a material fact was underinclusive and did not permit denaturalization based on violations of the good moral character requirement—including violations based on false but immaterial testimony. See 1961 House Report 39-40; see also 8 U.S.C. 1101(f).

Second, petitioner overlooks a number of differences between the civil and criminal statutes that help explain why Congress adopted a two-track system and that undercut her assertion that the civil provision is narrower than the criminal one. A criminal conviction under Section 1425(a) exposes the defendant to fines and imprisonment in addition to denaturalization. To obtain those criminal penalties, however, the government must act within ten years of the offense, 18 U.S.C. 3291; it must prove to a jury beyond a reasonable doubt that the defendant "knowingly" procured naturalization contrary to law, 18 U.S.C. 1425(a); and it must satisfy all the usual safeguards of due process that apply in criminal cases, see Pet. App. 27a-28a.

If the government elects to proceed in a civil case under Section 1451(a)—as it must once the statute of limitations for a criminal prosecution has run, see *Costello*, 365 U.S. 281 (noting lack of limitations period for civil denaturalization)—it cannot obtain criminal penalties and will not have the benefit of the speedy trial requirements applicable to criminal cases. On the other hand, the government need not establish that the alien "knowingly" procured her naturalization unlawfully, see *Ginsberg*, 243 U.S. at 475, and may prove its case to a judge by "clear, unequivocal, and convincing" evidence, *Schneiderman* v. *United States*, 320 U.S. 118, 125 (1943) (citation omitted); see *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984) (noting that "clear, unequivocal and convincing evidence" is "not proof beyond a reasonable doubt") (citation omitted). And in the case of naturalization procured by concealment or misrepresentation of a material fact, the defendant must rebut a presumption that he was

wrongly naturalized. *Kungys*, 485 U.S. at 776-777 (plurality op.); see *id.* at 783 (Brennan, J., concurring).

Moreover, and contrary to petitioner's assertions, the "illegally procured" provision of Section 1451(a) permits denaturalization based on false statements other than those involving the concealment or misrepresentation of material facts, including immaterial false testimony and other false statement offenses that demonstrate a lack of good moral character under 8 U.S.C. 1427(a)(3) and 1101(f). The statute's separate enumeration of material concealments and misrepresentations relieves the government of having to establish an underlying violation of a specific statute to obtain denaturalization on that ground, but it does not mear that material false statements are the *only* ones subject to Section 1451(a).

But even if petitioner were correct that 8 U.S.C. 1451(a) requires proof of materiality, that fact would present no reason to limit the scope of Section 1425(a) by inserting a materiality requirement. For over two centuries, Congress has sought to protect the naturalization process and prohibit illegal and immoral conduct by those seeking citizenship in order "to safeguard the integrity of this priceless treasure." *Fedorenko*, 449 U.S. at 507 (citation and internal quotation marks omitted). Congress has addressed that issue in a "broad[] statutory framework" that uses different tools to reach the same ends, Pet. App. 9a, and no legal principle exists that would require Congress to ensure that its criminal provisions mirror the scope of its civil ones.

E. The Constitutional Avoidance Doctrine And Rule Of Lenity Do Not Apply

1. Petitioner contends (Br. 29-30) that the severity of denaturalization requires the Court to infer a materiality requirement in Section 1425(a) to avoid constitutional concerns. In petitioner's view, any other construction of the statute would make naturalized persons "'second-class' citizens." Pet. Br. 29. That argument is incorrect.

"Naturalization is a privilege, to be given, qualified, or withheld as Congress may determine, and which the alien may claim as of right only upon compliance with the terms which Congress imposes." *United States* v. *Macintosh*, 283 U.S. 605, 615 (1931), overruled on other grounds, *Girouard* v. *United States*, 328 U.S. 61 (1946); see Alexander Porter Morse, *A Treatise on Citizenship* § 29, at 44 (1881) ("Naturalization * * * is a gratuitous concession, which is accorded as a pure favor to an alien desiring to acquire the character of citizen on compliance with certain conditions prescribed by the sovereign power of the adopting state."). Congress is invested with broad constitutional authority to establish the requirements and conditions for obtaining citizenship and to take steps to safeguard the integrity of the naturalization process. See *Macintosh*, 283 U.S. at 615 ("That Congress regarded the admission to citizenship as a serious matter is apparent from the conditions and precautions with which it carefully surrounded the subject."). Those rules are to be "rigidly * * * enforce[d]," and "[n]o alien has the slightest right to naturalization unless all statutory requirements are complied with." *Ginsberg*, 243 U.S. at 474, 475; see *Fedorenko*, 449 U.S. at 506-507. An alien's failure to

strictly comply with those rules renders his naturalization void and permits the revocation of his citizenship, which "was never rightfully his" to begin with. *Johannessen* v. *United States*, 225 U.S. 227, 242-243 (1912); see *Baumgartner*, 322 U.S. at 672; *Ginsberg*, 243 U.S. at 475.

Petitioner concedes that Congress may revoke naturalization that was "unlawfully procured," but suggests a possible constitutional limitation on that power when denaturalization is premised on immaterial false statements. Pet. Br. 29 (citation omitted). No authority exists for such a rule.

"Failure to give frank, honest, and unequivocal answers * * * when one seeks naturalization is a serious matter." *Chaunt*, 364 U.S. at 352. Congress is entitled to demand that aliens give a "[f]ull and truthful response to all relevant questions required by the naturalization procedure" and to "vigorously discourage[]" those who would "temporiz[e] with the truth." *Ibid.* That is no less true when an alien gives false testimony with the intent to obtain naturalization or makes criminal false statements under oath in a naturalization proceeding, even about an immaterial matter. Such lies indicate a lack of good moral character, which "Congress regarded * * * as [a] matter[] of the first importance" in determining whether a person should be granted the privilege of citizenship. *Macintosh*, 283 U.S. at 616. They indicate an alien's willingness to swear falsely and call into question the alien's ability to truthfully accede to the oath of citizenship. And although the "[s]uppressed or concealed facts" underlying the false statements "might [not] in and of themselves justify denial of citizenship," the government is still entitled to know those facts because they

"might [lead] to the discovery of other facts which would justify denial of citizenship." *Chaunt*, 364 U.S. at 352-353.[8]

It is precisely because American citizenship is such a "priceless treasure," *Fedorenko*, 449 U.S. at 507 (citation omitted), that Congress has carefully guarded it. Congress regarded certain false statements in the naturalization process, material or not, to be so serious that it made them crimes and made aliens responsible for those false statements ineligible for citizenship. Petitioner violated those requirements and thus procured her naturalization "contrary to law." 18 U.S.C. 1425(a). No constitutional principle undermines that judgment.

2. Petitioner contends (Br. 28) that her construction of Section 1425(a) should be preferred under the rule of lenity. That rule "applies only when a criminal statute contains a 'grievous ambiguity or uncertainty,' and 'only if, after seizing everything from which aid can be derived,' the Court 'can make no more than a guess as to what Congress intended.'" *Ocasio* v. *United States*, 136 S. Ct. 1423, 1434 n.8 (2016) (quoting *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998)); see *Moskal* v. *United States*, 498 U.S. 103, 107 (1990) (noting that the Court has "declined to deem a statute 'ambiguous' for purposes of lenity merely because it was *possible* to articulate a construction

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[8] Those concerns are especially true with respect to information about potential refugees like petitioner. See, *e.g.*, J.A. 51 ("ordinarily individuals are fleeing countries [to] which [U.S. officials] have no access" and thus "the adjudicator is totally reliant on the forms, the information in the forms and the interview," because "there's generally no other way to get information other than those sources").

more narrow than that urged by the Government"). As explained, petitioner's reading of Section 1425(a) is inconsistent with the text, structure, and history of the statute. The rule of lenity does not apply.

II. PETITIONER'S CLAIM THAT MATERIALITY IS AN ELEMENT OF 18 U.S.C. 1015(a) IS NOT PROPERLY BEFORE THIS COURT AND LACKS MERIT IN ANY EVENT

Petitioner contends (Pet. 30-37) that even if this Court concludes that Section 1425(a) does not require proof of materiality, her conviction should nonetheless be vacated because one of her predicate offenses—knowingly making "any false statement under oath, in any case, proceeding, or matter relating to * * * naturalization," in violation of 18 U.S.C. 1015(a)—requires a material false statement. The Court should decline to consider that claim because it is not within the question presented in this case and because petitioner waived it in the court of appeals. In any event, there is no merit to her contention that Section 1015(a) requires proof of materiality.

A. Petitioner's Claim Is Not Encompassed By The Question Presented In This Case And Has Been Waived

In her petition for a writ of certiorari, petitioner asked this Court to grant review to resolve the limited question of "[w]hether the Sixth Circuit erred by holding, *in direct conflict with the First, Fourth, Seventh, and Ninth Circuits*, that a naturalized American citizen can be stripped of her citizenship in a criminal proceeding based on an immaterial false statement." Pet. i (emphasis added). As petitioner acknowledged, the circuit conflict identified in that

question concerns "the existence of a materiality requirement in [Section] 1425(a)." *Id.* at 19; see Pet. Reply Br. 1 (emphasizing circuits' disagreement over whether materiality is "required to establish a violation of 18 U.S.C. § 1425(a)" and arguing that "[t]his Court's review is warranted because the federal courts of appeals are concededly divided on [that] important and recurring question") (citation omitted). All of the cases petitioner cited as evidence of the circuit conflict in her petition, see Pet. 1, 15-16, concern the elements of Section 1425(a), not Section 1015(a) or other predicate offenses. See *Munyenyezi*, 781 F.3d at 536; *Latchin*, 554 F.3d at 712-715; *United States* v. *Alferahin*, 433 F.3d 1148, 1154-1156 (9th Cir. 2006); *United States* v. *Aladekoba*, 61 Fed. Appx. 27, 28 (4th Cir. 2003) (per curiam); *United States* v. *Puerta*, 982 F.2d 1297, 1301 (9th Cir. 1992).

Petitioner briefly asserted in her petition (at 22) that Section 1015(a) "also requires a material false statement," but she did not present that as a distinct question for this Court's review nor is it fairly included within her question presented. See *Wood* v. *Allen*, 558 U.S. 290, 304 (2010) ("[T]he fact that petitioner discussed this issue in the text of his petition for certiorari does not bring it before us. [Supreme Court] Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for our review.") (brackets and citation omitted). Indeed, unlike Section 1425(a), there is *no* circuit conflict over whether Section 1015(a) requires proof of materiality. Every court of appeals to have considered the issue, including two of the circuits identified in petitioner's question presented, have held that materiality is not an element of Section 1015(a). See *Youssef*, 547 F.3d

at 1095 (9th Cir.); *Abuagla*, 336 F.3d at 279 (4th Cir.). The other courts of appeals identified in the question presented have not addressed the issue at all.[9]

Nonetheless, in her brief on the merits, petitioner modifies her own question presented to eliminate any reference to the circuit conflict. See Pet. Br. i. She does so, presumably, in order to accommodate her "alternative" argument that Section 1015(a) would require proof of materiality in her case even if Section 1425(a) does not. *Id.* at 30. This Court should not address that claim.

"As a general rule," this Court "do[es] not decide issues outside the questions presented by the petition for certiorari." *Glover* v. *United States*, 531 U.S. 198, 205 (2001) (citing Sup. Ct. R. 14.1). The petitioner ordinarily "controls the scope of the question presented" in her petition and may "frame the question as broadly or as narrowly as he sees fit." *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992). "[H]aving persuaded [the Court] to grant certiorari" to resolve a specific circuit conflict related to the elements of Section 1425(a), however, petitioner is bound by that choice and cannot broaden the question presented at

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[9] In its brief in opposition to the petition for a writ of certiorari, the government noted that the meaning of Section 1015(a) was not at issue because petitioner's conviction under Section 1425(a) was also based on a predicate violation of the "good moral character" requirement in 8 U.S.C. 1427(a)(3), which indisputably does not require materiality. See Br. in Opp. 10-11. And given the precise question petitioner chose to present, the government further argued that the elements of Section 1015(a) were relevant only as evidence of the meaning of Section 1425(a). See *id.* at 12 ("Because neither of the predicate offenses relied upon in this case requires proof of materiality, it would be anomalous to read an implied materiality requirement into Section 1425(a).").

the merits stage to encompass an alternative claim about the elements of a different statute on which no disagreement exists. *City & County of San Francisco* v. *Sheehan*, 135 S. Ct. 1765, 1772 (2015); see *Yee*, 503 U.S. at 536-538 (refusing to consider petitioner's alternative claim where the question presented identified a specific circuit conflict and the alternative claim concerned a "related" issue on which the circuits did not disagree) (emphasis omitted).

Enforcing that rule is particularly appropriate in this case. First, a holding in petitioner's favor regarding Section 1015(a) (but not Section 1425(a)) would not resolve the question on which this Court granted review *or* the revised question petitioner advances in her brief on the merits. At most, such a holding would establish that proof of materiality is required to convict a defendant of a Section 1425(a) offense based on an underlying violation of Section 1015(a); it would not address whether a defendant may be convicted under Section 1425(a)—and denaturalized—based on immaterial false statements that violate the "good moral character" requirement of 8 U.S.C. 1427(a)(3) or another predicate violation of law that lacks a materiality requirement.

Second, a holding that Section 1015(a) requires proof of materiality would not likely affect the validity of petitioner's conviction in this case. As explained, the jury was instructed that it could convict petitioner under Section 1425(a) if it found that she violated Section 1015(a), Section 1427(a)(3), or both. Pet. App. 85a-86a. Although petitioner is correct (Br. 31-32) that an instructional error on one ground of conviction ordinarily precludes summary affirmance of a general verdict on an alternative ground, see *Skilling* v.

United States, 561 U.S. 358, 414 (2010), it does not preclude a finding of harmlessness, *ibid.* Any error concerning Section 1015 was harmless in light of the jury's finding that petitioner knowingly gave false testimony in her refugee interview in order to "gain[] admission into the United States" and gave false testimony in her naturalization interview to conceal that fact. Pet. App. 91a-92a (verdict form); see *id.* at 55a-60a, 64a, 74a; J.A. 82-85, 93-94. Petitioner's conviction is therefore valid under 8 U.S.C. 1427(a)(3) and 1101(f)(6).

Third, and in any event, petitioner expressly waived an argument that Section 1015(a) requires proof of materiality in the court of appeals. See Pet. C.A. Br. 17 (arguing that government's reliance on authority establishing that Section 1015(a) does not require materiality "was misplaced" because "whether [Section] 1015(a) includes a materiality requirement [is] a question not raised here"); *ibid.* (arguing that, "[u]nlike the defendant in" the cited case, petitioner "was not charged with violating [Section] 1015(a)"). Petitioner's waiver provides an additional reason not to consider her belated challenge to her conviction based on a statute other than the one addressed in the question presented. See *Helvering* v. *Wood*, 309 U.S. 344, 348-349 (1940).

B. Materiality Is Not An Element Of Section 1015(a)

1. Regardless, proof of materiality is not required under 18 U.S.C. 1015(a). Petitioner's argument (Br. 33) is based on a supposed "general rule" that Congress is presumed to require proof of materiality when it criminalizes false statements absent "statutory language that in essence supplies the constraints that a materiality requirement would otherwise pro-

vide." No such rule exists. Congress has the unquestioned authority to criminalize false statements made to government officials or in connection with government programs and is "entitled to require that [such] information be given in good faith and not falsely with intent to mislead," even if "the statements were not influential or the information [was] not important." *Wells*, 519 U.S. at 494 (quoting *Kay* v. *United States*, 303 U.S. 1, 6 (1938)).

When Congress seeks to criminalize only material false statements, it usually does so explicitly. Congress has, for example, made it a crime to knowingly and willfully "make[] any materially false, fictitious, or fraudulent statement or representation" in a matter within federal jurisdiction, 18 U.S.C. 1001(a)(2), or to "knowingly make[] any false material declaration" under oath in connection with a court or grand jury proceeding, 18 U.S.C. 1623(a). This Court has implied a requirement of materiality where none was apparent on the face of the statute in only one circumstance. In *Neder*, *supra*, the Court held that the federal mail, wire, and bank fraud statutes, 18 U.S.C. 1341, 1343, and 1344, require proof of materiality notwithstanding the absence of "express materiality requirements" in those statutes. 527 U.S. at 23 & n.7. The Court did so because those statutes incorporate the common law definition of "fraud," which "required a misrepresentation or concealment of *material* fact." *Id.* at 22; see *ibid.* ("[T]he common law could not have conceived of 'fraud' without proof of materiality.").

As this Court has repeatedly explained, however, statutes criminalizing "false statements" do not similarly "presuppose[] materiality." *Wells*, 519 U.S. at 495; see *id.* at 490, 491 (noting that "the term 'false

statement' carries no general suggestion of influential significance" and did not "acquire[] any implication of materiality" at common law); *Kungys*, 485 U.S. at 781 (noting that, unlike fraudulent misrepresentation, "statutory use of the term 'false' or 'falsity'" is not "commonly associated" with "a requirement of materiality"). Congress's failure to "say that a material fact must be the subject of the false statement or [to] so much as mention materiality" provides compelling proof that materiality is not an element of such statutes. *Wells*, 519 U.S. at 490. Indeed, the Court in *Wells* rejected an argument by Justice Stevens—similar to the one petitioner advances here—that courts should presume that Congress intended "that [a] materiality requirement would be implied" in a false statement offense "wherever it was not explicit." *Id.* at 509 (Stevens, J., dissenting); see *id.* at 493 n.14 (majority op.) (rejecting argument).

Section 1015(a) does not mention materiality or incorporate a common law term that historically required materiality. The statute's reference to a "false statement," 18 U.S.C. 1015(a), does not imply materiality. And the rest of the statute confirms that materiality is not an element. The statute prohibits "knowingly mak[ing] *any* false statement," *ibid.* (emphasis added), which is most "naturally" read to have "an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)); see Bryan A. Garner, *Modern American Usage* 51 (2003) ("In affirmative sentences," the word "any" "means 'every' or 'all.'") (emphasis omitted). The rest of the statute requires only that the false statement be made "under

oath" in a proceeding or matter "relating to * * * naturalization, citizenship, or registry of aliens." 18 U.S.C. 1015(a). Congress's decision to include those specific limitations without also including a materiality limitation indicates that materiality is not required. See *Wells*, 519 U.S. at 490 (holding that 18 U.S.C. 1014 does not require materiality because, *inter alia*, the statute's "terms cover 'any' false statement that meets the other requirements in the statute").

That interpretation is confirmed by a comparison to other statutes. Congress has, for example, included a materiality requirement in the general statute prohibiting "false, fictitious, or fraudulent" statements in matters within federal jurisdiction, 18 U.S.C. 1001(a)(2), and in a related statute that prohibits material false statements under oath in immigration matters, 18 U.S.C. 1546(a). Congress's decision to include an express materiality element in those statutes confirms that it did not intend to include that element in Section 1015(a). See, *e.g.*, *Barnhart*, 534 U.S. at 452; *Shabani*, 513 U.S. at 14; cf. *Wells*, 519 U.S. at 493 n.14 (noting that, if Congress intended for courts to infer a materiality requirement in all false statement statutes, its enumeration of that requirement in some statutes would be "surplusage").

The history of Section 1015(a) reinforces the statute's plain meaning. As explained (see pp. 25-26, 28, *supra*), Section 1015(a) is descended from Section 1 of the 1870 Act, which provided that "knowingly swear[ing] or affirm[ing] falsely" in proceedings "relating to the naturalization of aliens" constituted "perjury." 16 Stat. 254. Petitioner concedes (Br. 33-34 n.5) that the "materiality requirement" implicit in the term "perjury" "was dropped in 1909." See 1909 Act

§ 80, 35 Stat. 1103. As with the similar history of Sections 1014 and 1425(a), "[t]he most likely inference in these circumstances is that Congress deliberately dropped the term 'materiality' without intending materiality to be an element of [Section 1015(a)]." *Wells*, 519 U.S. at 493.

2. Petitioner has no response to the textual and historical evidence that Section 1015(a) lacks a materiality element. Instead, she invokes the maxim *de minimis non curat lex* ("the law cares not for trifles") to argue that Section 1015(a) must be construed to contain a materiality requirement to avoid making trivial misstatements a crime. Pet. Br. 32 (citation omitted). But that principle cannot overcome plain statutory text. See *Sandifer* v. *United States Steel Corp.*, 134 S. Ct. 870, 880 (2014). And in any event, the fact that a statement is "immaterial" in a particular context does not necessarily make it a mere "trifle." Petitioner, for example, has consistently argued that her false statements were immaterial, see, *e.g.*, Pet. 23, but it can hardly be said that lying under oath about her husband's whereabouts and activities during the Bosnian civil war in an effort to conceal his service in a military unit that committed genocide—and then perpetuating that lie with more false statements under oath when applying for naturalization—was simply a trifling misstatement about which Congress could have no valid concern.

Petitioner emphasizes (Br. 34-38) this Court's observation in *Wells* that the statute at issue in that case, 18 U.S.C. 1014, requires proof of a false statement made "for the purpose of influencing" a bank, which the Court noted would "not normally take the scope of [Section] 1014 beyond the limit that a mate-

riality requirement would impose." 519 U.S. at 499 (citation omitted). The Court did not suggest, however, that courts must infer a similar limitation in other false statement statutes that do not require materiality, or that this feature of Section 1014 was essential to finding that the statute lacked a materiality requirement. See *id.* at 490-497 (citing text of Section 1014, other statutes, and legislative history to conclude that proof of materiality was not required).

In any event, the same purpose to influence is likely present when a person knowingly lies under oath when seeking naturalization. Individuals do not typically lie under oath without expecting to benefit. While unlikely variant hypotheticals can be imagined, Congress is entitled to legislate with the most likely cases in mind. Moreover, as with Section 1425(a), the *mens rea* requirement of Section 1015(a)—requiring a *knowing* violation of the defendant's oath—helps to ensure that criminal liability is not premised on truly trivial or innocuous misstatements.

3. Congress had good reason to criminalize material and immaterial false statements made under oath in the naturalization process. See pp. 36-37, *supra*. Indeed, immaterial false statements that violate Section 1015(a) may preclude a finding of good moral character under 8 U.S.C. 1101(f)(6) or the residual provisions of 8 U.S.C. 1101(f) and 8 C.F.R. 316.10(b)(3)(iii) and thus act as a statutory bar to naturalization. It does not matter, for that purpose, what the alien lied *about*; what matters is that she took an oath to tell the truth and knowingly violated it.

III. PETITIONER'S MISREPRESENTATIONS TO IMMIGRATION OFFICIALS WERE MATERIAL

Even if this Court were to find that the district court erred by omitting a materiality requirement from its instructions concerning Section 1425(a) or Section 1015(a), any error was harmless because petitioner's false statements to immigration officials were plainly material. See *Skilling*, 561 U.S. at 414.

A material misrepresentation is one that "has a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed." *Kungys*, 485 U.S. at 770 (internal quotation marks omitted); see *Neder*, 527 U.S. at 16 (same). Petitioner concedes that this is the proper standard (Br. 24), but she misinterprets it, arguing (Br. 30) that the government must prove that she "would not have obtained American citizenship but for" her false statements. As explained, this Court has rejected such a "requirement of 'but for' causality." *Kungys*, 485 U.S. at 777 (plurality op.). Rather, "materiality looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation" and generally requires only that "a reasonable man would attach importance to [the misrepresentation] in determining his choice of action in the transaction." *Universal Health Servs., Inc.* v. *Escobar*, 136 S. Ct. 1989, 2002-2003 (2016) (brackets, internal quotation marks, and citation omitted); see *Neder*, 527 U.S. at 22 & n.5 (same). The facts of this case, which petitioner does not dispute, amply satisfy that standard.

In 1998, petitioner falsely stated under oath to immigration officials that her family feared persecution because her husband refused to serve in the Bosnian

Serb Army during the Bosnian civil war. Pet. App. 51a, 58a-60a. In fact, petitioner's husband had been an officer in a unit of the Bosnian Serb Army that participated in the persecution and genocide of Bosnian Muslims at Srebrenica. *Id.* at 4a, 59a-60a. Petitioner also swore to immigration officials that she and her husband had lived apart between 1992 to 1997, when in fact they had lived together in Bosnia during that time. *Id.* at 4a, 55a-60a. One week after her husband's 2006 arrest for making false statements about his military service, petitioner lied twice on her naturalization application, claiming in response to two different questions that she had not given false or misleading information to government officials while applying for immigration benefits. *Id.* at 5a, 72a, 74a; see J.A. 94, 98-99. Petitioner then used her status as a naturalized citizen to attempt to prevent her husband's removal by having him reclassified as a lawful permanent resident. J.A. 104-105.

Individuals who participate in acts of persecution cannot qualify as refugees. J.A. 36. At the time petitioner was seeking refugee status for her family in the late 1990s, any applicant's military participation in the Bosnian civil war would have been "a matter of concern" because acts of persecution were often "perpetrated by or conducted by military organizations," and no applicant who had participated in such actions would be eligible for refugee status. J.A. 44-45; see J.A. 89 ("typically a person granted asylum would not have been involved in the Republika Srpska Army" due to the "war crimes and other atrocities that were committed"). Moreover, if it were revealed that a principal applicant (like petitioner) had made a misrepresentation about one of the derivative applicants

(like her husband), it would "certainly raise issues" regarding whether the principal applicant was eligible for admission as a refugee. J.A. 50.

If petitioner had answered questions 23 and 24 in her Application for Naturalization truthfully—if she had admitted to giving false or misleading information to immigration officials about her husband's military service and their whereabouts during the civil war when applying for refugee status, see Pet. App. 72a—her answers would have been relevant to determining whether she was "eligible for * * * naturalization." J.A. 86. Petitioner's false statements were relevant to whether she was "properly admitted" as a refugee "or adjusted status properly to that of a permanent resident," which is a necessary precondition for naturalization. *Ibid.* They were also relevant to determining her "good moral character," which "play[s] * * * one of the most important roles" in an "application to become a U.S. citizen." J.A. 97 (capitalization altered). "Lying under oath to an immigration officer or lying to obtain an immigration benefit" would preclude a finding of good moral character. J.A. 80. Because of that, immigration officials considered it important to "make sure" that an applicant for naturalization, like petitioner, was "eligible for all benefits along the way on [her] pathway to citizenship" before acting on her application. *Ibid.* Evidence of "a fraudulently procured earlier benefit or application for an immigration benefit" would have "affect[ed] [the] agency's determination on the applicant's good moral character" and thus her eligibility for citizenship. *Ibid.*

Petitioner's lies also affected the naturalization proceeding itself. Had petitioner checked "yes" to either question 23 or 24, "there would have been fur-

ther questioning" and petitioner's application "would have been sent for a further review * * * because that would question her eligibility." J.A. 99. At a minimum, the individual who was processing petitioner's Application for Naturalization would not have been authorized to grant her application for citizenship and would instead have been required to commence an investigation. *Ibid.*

The evidence clearly shows that petitioner's lies were "capable of affecting" official decisions concerning her naturalization. *Kungys*, 485 U.S. at 771. Petitioner's lies were material to her eligibility for citizenship because they concealed evidence of her lack of good moral character and prevented the government from learning facts that called into question the lawfulness of her immigration history. They also affected the conduct of the naturalization proceeding, allowing petitioner to avoid an investigation and hastening her grant of citizenship, which she then used in an attempt to protect her husband from removal. Any error in failing to instruct the jury on materiality was harmless.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 8 U.S.C. 1101(f) provides:

Definitions

(f) For the purposes of this chapter—

No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established is, or was—

(1) a habitual drunkard;

(2) Repealed. Pub. L. 97–116, § 2(c)(1), Dec. 29, 1981, 95 Stat. 1611.

(3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and (10)(A) of section 1182(a) of this title; or subparagraphs (A) and (B) of section 1182(a)(2) of this title and subparagraph (C) thereof of such section[8] (except as such paragraph relates to a single offense of simple possession of 30 grams or less of marihuana), if the offense described therein, for which such person was convicted or of which he admits the commission, was committed during such period;

(4) one whose income is derived principally from illegal gambling activities;

(5) one who has been convicted of two or more gambling offenses committed during such period;

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[8] So in original. The phrase "of such section" probably should not appear.

(6) one who has given false testimony for the purpose of obtaining any benefits under this chapter;

(7) one who during such period has been confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more, regardless of whether the offense, or offenses, for which he has been confined were committed within or without such period;

(8) one who at any time has been convicted of an aggravated felony (as defined in subsection (a)(43) of this section); or

(9) one who at any time has engaged in conduct described in section 1182(a)(3)(E) of this title (relating to assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings) or 1182(a)(2)(G) of this title (relating to severe violations of religious freedom).

The fact that any person is not within any of tne foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character. In the case of an alien who makes a false statement or claim of citizenship, or who registers to vote or votes in a Federal, State, or local election (including an initiative, recall, or referendum) in violation of a lawful restriction of such registration or voting to citizens, if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of such statement,

claim, or violation that he or she was a citizen, no finding that the alien is, or was, not of good moral character may be made based on it.

2. 8 U.S.C. 1427 provides in pertinent part:

Requirements of naturalization

(a) Residence

No person, except as otherwise provided in this subchapter, shall be naturalized unless such applicant, (1) immediately preceding the date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his application has been physically present therein for periods totaling at least half of that time, and who has resided within the State or within the district of the Service in the United States in which the applicant filed the application for at least three months, (2) has resided continuously within the United States from the date of the application up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

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(e) Determination

In determining whether the applicant has sustained the burden of establishing good moral character and the other qualifications for citizenship specified in subsection (a) of this section, the Attorney General shall not be limited to the applicant's conduct during the five years preceding the filing of the application, but may take into consideration as a basis for such determination the applicant's conduct and acts at any time prior to that period.

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3. 8 U.S.C. 1451 provides in pertinent part:

Revocation of naturalization

(a) Concealment of material evidence; refusal to testify

It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any district court of the United States in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate,

respectively: *Provided*, That refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any proceeding before a congressional committee concerning his subversive activities, in a case where such person has been convicted of contempt for such refusal, shall be held to constitute a ground for revocation of such person's naturalization under this subsection as having been procured by concealment of a material fact or by willful misrepresentation. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence.

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(e) Citizenship unlawfully procured

When a person shall be convicted under section 1425 of title 18 of knowingly procuring naturalization in violation of law, the court in which such conviction is had shall thereupon revoke, set aside, and declare void the final order admitting such person to citizenship, and shall declare the certificate of naturalization of such person to be canceled. Jurisdiction is conferred on the courts having jurisdiction of the trial of such offense to make such adjudication.

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4. 18 U.S.C. 1015 provides:

Naturalization, citizenship or alien registry

(a) Whoever knowingly makes any false statement under oath, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization, citizenship, or registry of aliens; or

(b) Whoever knowingly, with intent to avoid any duty or liability imposed or required by law, denies that he has been naturalized or admitted to be a citizen, after having been so naturalized or admitted; or

(c) Whoever uses or attempts to use any certificate of arrival, declaration of intention, certificate of naturalization, certificate of citizenship or other documentary evidence of naturalization or of citizenship, or any duplicate or copy thereof, knowing the same to have been procured by fraud or false evidence or without required appearance or hearing of the applicant in court or otherwise unlawfully obtained; or

(d) Whoever knowingly makes any false certificate, acknowledgment or statement concerning the appearance before him or the taking of an oath or affirmation or the signature, attestation or execution by any person with respect to any application, declaration, petition, affidavit, deposition, certificate of naturalization, certificate of citizenship or other paper or writing required or authorized by the laws relating to immigration, naturalization, citizenship, or registry of aliens; or

(e) Whoever knowingly makes any false statement or claim that he is, or at any time has been, a citizen or national of the United States, with the intent

to obtain on behalf of himself, or any other person, any Federal or State benefit or service, or to engage unlawfully in employment in the United States; or

(f) Whoever knowingly makes any false statement or claim that he is a citizen of the United States in order to register to vote or to vote in any Federal, State, or local election (including an initiative, recall, or referendum)—

Shall be fined under this title or imprisoned not more than five years, or both. Subsection (f) does not apply to an alien if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making the false statement or claim that he or she was a citizen of the United States.

5. 18 U.S.C. 1425 provides:

Procurement of citizenship or naturalization unlawfully

(a) Whoever knowingly procures or attempts to procure, contrary to law, the naturalization of any person, or documentary or other evidence of naturalization or of citizenship; or

(b) Whoever, whether for himself or another person not entitled thereto, knowingly issues, procures or obtains or applies for or otherwise attempts to procure or obtain naturalization, or citizenship, or a declaration of intention to become a citizen, or a certificate of arrival or any certificate or evidence of nationalization

or citizenship, documentary or otherwise, or duplicates or copies of any of the foregoing—

Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929(a) of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.